Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner

v.

DAVID JONES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL

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QUESTIONS PRESENTED

I

ARE A DEFENDANT'S DUE PROCESS RIGHTS VIOLATED WHERE UNOBJECTED TO PRELIMINARY COMMENTS TO PROSPECTIVE JURORS CONCERNING REASONABLE DOUBT ARE MADE PRIOR TO THE INTRODUCTION OF ANY EVIDENCE AND ARE FOLLOWED AT THE CLOSE OF THE CASE WITH FLORIDA'S STANDARD JURY INSTRUCTIONS WHICH COMPREHENSIVELY INFORM AND REQUIRE AN ABIDING CONVICTION OF GUILT?

II

DO A TRIAL JUDGE'S COMMENTS, IN RESPONSE TO A JUROR'S QUESTION, THAT A DEFENDANT'S BACKGROUND INFORMATION, IF ANY, DOES NOT COME OUT IF HE DOES NOT TESTIFY AND THAT HIS FAILURE TO TESTIFY CANNOT BE HELD AGAINST HIM, VIOLATE A DEFENDANT'S RIGHT TO A FAIR TRIAL?

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL

OPINIONS BELOW

The opinion of the Fourth District Court of Appeals is reported as *Jones v. State,* 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied,* ___ So. 2d ___ (Fla. Nov. 07, 1995) and is reprinted in the Appendix of this pleading. [A-1–5].[1] A motion for rehearing was denied on July 21, 1995. [A-6].

JURISDICTION

Jurisdiction to consider this petition for certiorari is being invoked under 28 U.S.C. §1257. Review was denied by the Florida Supreme Court on November 7, 1995. [A-9]. Further information supporting this Court's jurisdiction is in the "Reasons For Granting The Writ" portion of this brief.

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1 The symbol "A" followed by the appropriate numbers represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, *United States Constitution*, provides:

> No persons shall be...deprived of life, liberty, or property, without due process of law;....

Amendment VI, *United States Constitution,* provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,....

Amendment XIV, *United States Constitution,* provides:

> ...nor shall any State deprive any person of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

Respondent's arrest and subsequent conviction arose from a confrontation with two police officers. The officers, in full uniform and in a marked car, observed Jones sitting on a bicycle yanking the handle of a car door. When approached, Jones hit an officer in the chest, jumped off his bicycle, and ran. After a chase, Jones was arrested. [A-1].

The trial judge made preliminary comments to the prospective jurors, including: [A-2–3].

> Now, the third cardinal rule is that in order for you the jury to find the Defendant guilty you must be satisfied, the State must convince you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty.

That's what is known as the standard of proof, and that's a landmark concept. That's a bedrock foundation of our American Criminal jurisprudence system. That anytime any jury anywhere in the United States of America, no matter what the charge is the State must demonstrate to the jury and satisfy to the jury beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.

Now, I'll give you a more elaborate definition of what that phrase and concept means. The phrase beyond and to the exclusion of every reasonable doubt means suffice it to say it's a very heavy burden that the State shoulders. Whenever charging somebody with committing a crime in order to secure conviction from the jury.

But even though it's a very heavy burden the State does not, I repeat, stress, emphasize, the State does not have to convince you the jury to an absolute certainty of the Defendant's guilt. You do not have to be one hundred percent certain of the Defendant's guilt in order to find the Defendant guilty.

The point I'm trying to make is you can still have a doubt as to the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason to that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. And if all the elements of the

> crime have been proven to you then you must find the Defendant guilty .

The trial judge told prospective jurors that the first cardinal rule was that the defendant must be presumed innocent. [A-11]. The second cardinal rule is that the State has the burden of proof. [A-11]. All elements must be proved beyond and to the exclusion of every reasonable doubt. [A-12].

At the close of evidence, the judge gave the following standard jury instructions (transcript. pp. 267–68):

> The Defendant has entered a plea of not guilty. What this means is you must believe and presume the Defendant to be innocent. The presumption of innocence stays with the Defendant as to each material allegation in the information through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the Defendant's presumption of innocence, the State has the burden of proving the following two elements: Number one, that the crime with which the defendant is charged was committed, and two, the Defendant is the person who committed that crime. Remember, the Defendant himself is never required to prove anything. Whenever you hear the words "reasonable doubt," you must consider the following: A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt. Such a doubt of that nature must not influence you to return a verdict of not guilty if, in fact, you have an abiding conviction of guilt. On the other hand, if after carefully, considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction,

it is one which is not stable but one which waivers and vacillates then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.

A reasonable doubt as to the guilt of the Defendant may arise from the evidence, lack of evidence or conflict in the evidence.

The bottom line is if you have a reasonable doubt you should find the Defendant not guilty. If you have no reasonable doubt you should find the Defendant guilty.

Prior to retiring, a juror asked (transcript p. 273–75):

[MR. ZITO:] How come in this case there was nothing presented as far as the background of the defendant or anything else? You know, in other words, prior arrests or education, or was it necessary in this particular case?

[THE COURT:] Well, that type of information doesn't come out at all unless the Defendant takes the witness stand and testifies and then you learn a little bit more about the Defendant. But he didn't have to testify and no one could hold it against him because he didn't testify.

[MR. ZITO:] I realize that.

[THE COURT:] Because he didn't have to testify and that information is not part of the record for the evidence you base your decision on.

* * *

[DEFENSE COUNSEL:] Judge, I would like to make it clear on the record that if there is any kind of information that it is sort of improper, I would like that for my Defendant. I want to make sure that they go back there with the knowledge that there may or may not. That they're not to assume that there is any information of that sort whatsoever.

[THE COURT:] Tell them base their decision on the evidence, that's all.

[DEFENSE COUNSEL: I would like you to clear the air though, Judge, because I feel that there is a possibility that they might go back there, by the way the question was answered, that there could be some information that wasn't shown. Tell them that they are not to even consider any type of information at all, period.

* * *

[THE COURT:] Okay. Folks, you can just base your decision on the evidence you heard in this particular case, all right. I mean there's nothing else before you, you know absolutely nothing about the Defendant. I'm not saying there's anything to know about the Defendant, so you have to base your decision on this case and on the evidence you heard and on the instructions you were just furnished by me to you, okay?

During final instructions, the trial judge stated (transcript pp. 269–70):

> The Defendant exercised a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by this decision. No juror should ever be concerned that the Defendant did not take the witness stand to give testimony in the case.

Appellant was convicted of attempted burglary of a conveyance and resisting an officer without violence. [A-1]. The Fourth District reversed the conviction, finding that the trial judge's comments regarding reasonable doubt constituted fundamental error and a denial of due process, citing *Cage v. Louisiana*, 498 U.S. 39 (1990). [A-3]. The Fourth District also found the trial judge's response to the juror's question to be reversible error. [A-4–5]. The Florida Supreme Court declined to exercise its discretionary jurisdiction. [A-9]. The trial judge granted a stay and extension of speedy trial time pending review by this Court. [A-11].

REASONS FOR GRANTING THE WRIT

I.

A DEFENDANT'S DUE PROCESS RIGHTS ARE NOT VIOLATED WHERE UNOBJECTED TO PRELIMINARY COMMENTS TO THE JURY CONCERNING REASONABLE DOUBT ARE MADE PRIOR TO THE INTRODUCTION OF ANY EVIDENCE AND ARE FOLLOWED AT THE CLOSE OF THE CASE WITH FLORIDA'S STANDARD JURY INSTRUCTIONS WHICH COMPREHENSIVELY INFORM AND REQUIRE AN ABIDING CONVICTION OF GUILT.

During the voir dire process of Respondent's trial, the trial court made the following comments relating to the State's burden of proof and the concept of reasonable doubt *without objection by Respondent:*

> Now, the third cardinal rule is that in order for you the jury to find the Defendant guilty you must be satisfied, the State must convince you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty.

That's what is known as the standard of proof, and that's a landmark concept. That's a bedrock foundation of our American Criminal jurisprudence system. That anytime any jury anywhere in the United States of America, no matter what the charge is the State must demonstrate to the jury and satisfy to the jury beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.

Now, I'll give you a more elaborate definition of what that phrase and concept means. The phrase beyond and to the exclusion of every reasonable doubt means suffice it to say it's a very heavy burden that the State shoulders. Whenever charging somebody with committing a crime in order to secure conviction from the jury.

But even though it's a very heavy burden the State does not, I repeat, stress, emphasize, the State does not have to convince you the jury to an absolute certainty of the Defendant's guilt. You do not have to be one hundred percent certain of the Defendant's guilt in order to find the Defendant guilty.

The point I'm trying to make is you can still have a doubt as to the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason to that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. And if all the elements of the

crime have been proven to you then you must find the Defendant guilty.

[A-2–3]. Following these comments, the trial court also informed the venire that

> [t]he fifth phase of the trial consists of the legal instructions. This is when I give you the law you apply to the evidence in this case. Any preconceived ideas you have as to what the law is or what the law should be must be disregarded. The only law that you apply to the evidence in this case is the law that I give you.

(Transcript p. 27). Finally, at the close of all the evidence, the trial court gave the following standard instruction relating to reasonable doubt:

> The Defendant has entered a plea of not guilty. What this means is you must believe and presume the Defendant to be innocent. The presumption of innocence stays with the Defendant as to each material allegation in the information through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the Defendant's presumption of innocence, the State has the burden of proving the following two elements: Number one, that the crime with which the defendant is charged was committed, and two, the Defendant is the person who committed that crime. Remember, the Defendant himself is never required to prove anything. Whenever you hear the words "reasonable doubt," you must consider the following: A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt. Such a doubt of that nature

> must not influence you to return a verdict of not guilty if, in fact, you have an abiding conviction of guilt. On the other hand, if after carefully, considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which waivers and vacillates then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.
>
> A reasonable doubt as to the guilt of the Defendant may arise from the evidence, lack of evidence or conflict in the evidence.
>
> The bottom line is if you have a reasonable doubt you should find the Defendant not guilty. If you have no reasonable doubt you should find the Defendant guilty.

(Transcript pp. 267–68).

On appeal from Respondent's convictions for attempted burglary of a conveyance and resisting an officer without violence, the Fourth District Court of Appeal held that the trial court's comments during voir dire, though not objected to, violated the due process clause of the United States and Florida Constitution, and thus constituted fundamental error. As a result, the district court reversed Respondent's convictions and remanded for a new trial. To support such action, the district court relied exclusively on this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990).[2]

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2 Because Florida courts routinely decide such matters by construing federal law, *e.g. Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994) (where Florida Supreme Court upheld the Florida standard jury instruction on reasonable doubt based on *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239 (1994)), this Court has jurisdiction to review this case. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

Petitioner submits that the district court misapplied the due process clause and this Court's holding in *Cage*. The trial court's comments were preliminary in nature and were presented as such, they were not objected to, they were not inaccurate statements of the law, and they were followed at the close of the evidence by the standard jury instruction on reasonable doubt. Under the totality of the circumstances, the district court improperly found the comments fundamental, reversible error. Therefore, this Court should grant this petition for writ of certiorari and correct the district court's erroneous application of the due process clause.

Contrary to the district court's holding, the trial court's comments to the venire, *in toto*, were an accurate statement of the law. The district court found fault with the comments because "certitude was not required" and because they suggested that the jury may base a guilty verdict on a "probability of guilt so long as it was a remarkably strong probability." [A-3]. The reasonable doubt standard, however, does not require "absolute certainty" or "one hundred percent certainty" as the trial court stated.

In *Victor v. Nebraska*, 511 U.S. —, 114 S.Ct. 1239, 127 L. Ed. 2d 583 (1994), this Court found no error in the following instruction:

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused. At the same time, *absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that*

> *possibly you may be mistaken. You may find an accused guilty upon the strong probabilities* of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. *A reasonable doubt is an actual and substantial doubt* arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from *mere possibility,* from bare imagination, or from fanciful conjecture.

511 U. S. at ___, 114 S.Ct. at 1249, 127 L.Ed.2d at 598 (some emphasis added). One defendant argued that the phrase "moral certainty" was error because a dictionary defined "moral certainty" as "resting upon convincing grounds of probability." 114 S.Ct. at 1247, 127 L. Ed. 2d at 595. This Court rejected that argument:

> But the beyond a reasonable doubt standard is itself *probabilistic.* "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened."

114 S.Ct. at 1247, 127 L.Ed.2d at 595–96 (emphasis added).

In the comments made to the venire, the trial court balanced the "absolute certainty" comment with further explanation:

> The phrase beyond and to the exclusion of every reasonable doubt means suffice it to say it's a very heavy burden that the State shoulders.

* * *

> A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason to that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt.

[A-3]. Thus, the State's burden of proof was not minimized. *See Victor,* 114 S.Ct. at 1250, 127 L.Ed.2d at 599 (finding no minimization of burden of proof where "reasonable doubt" equated with "substantial doubt" in light of "mere possibility, from bare imagination, or from fanciful conjecture" language).

In *Victor,* citing to *Estelle v. McGuire,* 502 U.S. 62 (1991), this Court again narrowly interpreted the standard of review applying *Cage* and held that "the proper inquiry is not whether the instruction 'could have' been applied in unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." 114 S.Ct. at 1243, 127 L.Ed.2d at 591 (emphasis in original). Unlike in *Victor* and *Cage,* the challenged comments in this case were made during voir dire. A jury had not yet been selected or sworn. At that point, the potential jurors had no legal duty to heed the preliminary comments. *United States v. Dilg,* 700 F.2d 620, 625 (1983). Thus, there is no reasonable likelihood that the final jurors applied these comments, as opposed to the standard instructions given at the close of the case, during their deliberations. This is especially true where, as here, the trial court specifically informed the venire that it would be given the law to apply at the end of the case.

As promised to the venire, the trial court gave complete, approved standard instructions on reasonable doubt and presumption of innocence at the end of the case. Those instructions included the "abiding conviction of guilt" language which this Court specifically approved in *Victor* as

correctly stating the Government's burden of proof. 114 S.Ct. at 1250, 127 L.Ed.2d at 600. In fact, this Court held in *Victor* that any problems with an instruction's definition of reasonable doubt is cured when combined with the "abiding conviction of guilt" language. *Id.*

What the district court failed to acknowledge and apply in this case was the well-established law that jury instructions must be read as a whole, not viewed in artificial isolation. *Henderson v. Kibbe,* 431 U.S. 145, 152 n.10 (1977); *Victor,* 114 S.Ct. at 1243, 1247, 1248, 1251. *See also Esty v. State,* 642 So. 2d 1074 (Fla. 1994) (citing *Victor* for the proposition that Florida's standard jury instruction, taken as a whole, properly defines reasonable doubt). In fact, in another case with comments by another trial court that are "substantially similar" to the ones made by the trial court in this case, the Fourth District has held:

> In addition, as in *Jones*, there were no proper balancing instructions. In both cases, the instructions were given to the venire, and the standard instructions were not given until the jury was being instructed before retiring. Without these balancing instructions the error was fundamental. Accordingly, we reverse in accordance with our prior opinion in *Jones.*

McInnis v. State, Fourth District case no. 94-2792 (Fla. 4th DCA Jan. 24, 1996). [A-14].

The district court's belief that the standard reasonable doubt instruction given prior to deliberations could not be considered because it was not given with the trial court's preliminary comments is without basis in the law. This would seem especially true here where the trial court told the venire that it would instruct the jury on the law at the end of the case and that any preconceived notions of law must be disregarded. Fundamental error should not be predicated on preliminary comments which were explained more thor-

oughly prior to deliberations. By failing to consider the totality of the circumstances, the district court erroneously applied the due process clause to reverse Jones' convictions.[3] As a result, this Court should grant this petition for writ of certiorari and correct the district court's misapplication of the law.

II

A TRIAL JUDGE'S STATEMENT, IN RESPONSE TO A JUROR'S QUESTION, THAT A DEFENDANT'S BACKGROUND INFORMATION, IF ANY, DOES NOT COME OUT IF HE DOES NOT TESTIFY AND THAT HIS FAILURE TO TESTIFY CANNOT BE HELD AGAINST HIM, DOES NOT VIOLATE A DEFENDANT'S RIGHT TO A FAIR TRIAL.

The Fourth District's decision on this issue gives no indication that it was based on an independent State ground. Rather, the wording of the opinion indicates the Fourth District felt respondent was denied his due process right to a "fair trial." 656 So. 2d at 491. [A-4–5].

In *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983), this Court held that when

> a state-court decision fairly appearing to rest on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as

3 By finding the comments fundamental error, and thus not demanding of an objection when made, the district court has potentially affected a large number of cases. The trial judge in *Jones* had been making these statements for many years. To date, this claim has been raised in at least fifteen cases. [A-18–19]. These cases include convictions for first-degree murder, vehicular homicide, and attempted first-degree murder. Prisoners have also begun raising this claim in postconviction motions. [A-19].

> the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Accordingly, nothing precludes this Court from exercising its jurisdiction.

"[A] single instruction to a jury must not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146–47 (1973). In reviewing whether a jury instruction violated a defendant's right to a fair trial, the only question is whether the "ailing instruction itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 147. It must be established not merely that the instruction is undesirable or erroneous, or universally condemned, but that it violated some right guaranteed by the Fourteenth Amendment. *Id.* at 146. Additionally, an instruction to a jury must not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Henderson v. Kibbe,* 431 U.S. 145, 152, n.10.

Here, the charge taken as a whole did not violate Respondent's due process right to a fair trial. The trial judge's statement was accurate. The statement made it clear that there may not be any significant background information. There was no suggestion that Respondent had any prior convictions or arrests. The trial judge instructed the jury that Respondent was presumed innocent. [A-11; Petitioner's brief p. 4]. The trial judge repeatedly emphasized that Respondent did not have to testify and no inferences could be drawn by that fact. [A-11; Petitioner's brief pp. 4, 5, 6]. The judge also instructed the jury that its decision must be based solely on the evidence. [Petitioner's brief p. 5].

Taken as a whole, the trial judge's instructions did not deprive Respondent of a fair trial. *Dowling v. United States,* 493 U.S. 342, 352–53 (1990)(defining rights guaranteed by the due process clause "very narrowly."). This Court should

accept review to correct the Fourth District's misapplication of the due process clause.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
JANUARY TERM 1995

DAVID JONES,
Appellant,

v.

CASE NO. 93-3248
L.T. CASE NO. 93-6875CF10

STATE OF FLORIDA
Appellee

Opinion filed February 1, 1995

Appeal from the Circuit Court for Broward County;
Mark A. Speiser, Judge.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

POLEN, J.

David Jones timely appeals his judgment and sentence, after a jury trial convicting him of attempted burglary of a conveyance and resisting an officer without violence. Jones's arrest, and subsequent conviction, arose out of a confrontation with two Fort Lauderdale police officers who, in full uniform, while patrolling in a marked police car, observed the defendant sitting on a bicycle, trying the handle of a car door. When the officers approached, Jones hit Officer Donisi in the chest, jumped off his bicycle, and ran. A chase ensued, after which Jones was apprehended with the aid of a K9 dog, and arrested. This two-point appeal arose out of the trial judge's having given, at trial, extemporaneous instructions as to

what constitutes "reasonable doubt," and his improper response to a juror's question, at the close of jury instructions, as to why they had not heard anything about the defendant's background. We reverse on both points.

The trial court gave extemporaneous instructions to the jury prior to commencement of the evidentiary portions of the proceedings. Those instructions included a segment where the "cardinal rules" were explained to the jury as to how the proceedings should be conducted on the jury's part. The third of those "cardinal rules" was that the jury should not demand proof beyond all doubt or complete certainty before finding appellant guilty. The relevant portion of the court's pretrial extemporaneous instructions were as follows:

> Now, the third cardinal rule is that in order for you the jury to find the Defendant guilty you must be satisfied, the State must convince you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty.
>
> That's what is known as the standard of proof, and that's a landmark concept. That's a bedrock foundation of our American Criminal jurisprudence system. That anytime any jury anywhere in the United States of America, no matter what the charge is the State must demonstrate to they jury and satisfy to the jury beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.
>
> Now, I'll give you a more elaborate definition of what that phrase and concept means. The phrase beyond and to the exclusion of every reasonable doubt means suffice it to say it's a very heavy burden that the State shoulders. Whenever charging somebody with committing a crime in order to secure conviction from the jury.

> *But even though it's a very heavy burden the State does not, I repeat, stress, emphasize, the State does not have to convince you the jury to an absolute certainty of the Defendant's guilt. You do not have to be one hundred percent certain of the Defendant's guilt in order to find the Defendant guilty.*
>
> The point I'm trying to make is you can still have a doubt as to the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. And if all the elements of the crime have been proven to you then you must find the Defendant guilty (emphasis added).

In the instant case, we agree with the appellant that the indispensable reasonable doubt standard, a component of due process of law in criminal proceedings was abridged by the trial judge's statement that certitude was not required. In fact, the instruction was tantamount to telling the jury that it could base a guilty verdict on a probability of guilt as long as it was remarkably strong probability. This kind of minimization of the reasonable doubt standard violated the due process clause of the federal and state constitutions. *See Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), wherein the Supreme Court deemed unacceptable a trial court's instruction that reasonable doubt "must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof."

At bar, we find that this minimization of the reasonable doubt standard constituted fundamental error as it deprived the appellant of his defense, the reliance on the reasonable doubt standard. In arriving at this conclusion, we specifically distinguish the case at bar from the holding in *Freeman v. State,* 576 So. 2d 415, 416 (Fla. 3d DCA 1991). In *Freeman,* the court held that a complaint with the reasonable doubt instruction was not preserved and did not amount to fundamental error. The court based its conclusion (that the jury instruction did not rise to the level of fundamental error) on the balancing effect of the court's having also given extensive and proper jury instructions on reasonable doubt and presumption of innocence. *Id.* at 416.

At bar, the trial judge's instructions were accurate as far as they went. However, the difficulty arises from the lack of completeness. The failure of the trial judge to give proper balancing instructions constitutes reversible error despite the fact that the appellant did not preserve the issue. Failure to give a complete and accurate instruction is *fundamental* error, *reviewable in the complete absence of a request or objection. See Carter v. State,* 469 So.2d 194 (Fla. 2d DCA 1985).

We also agree with the appellant, pertaining to Point II of his appeal, that it was reversible error for the trial judge to have impermissibly made an extemporaneous comment in addition to the standard jury instructions. In response to a juror's inquiry as to why nothing had been presented as to the background of the defendant, in terms of prior arrests or education, the trial judge's exact comment was:

[THE COURT]: Well, that type of information doesn't come out at all unless the Defendant takes the witness stand and testifies and then you learn a little more about the Defendant. But he didn't have to testify and no one could hold it against him because he didn't testify.

In *Kelly v. State,* 486 So. 2d 578, 584 (Fla. 1986), the court cautioned against deviating from the standard jury instructions, since a trial judge "walks a fine line indeed upon deciding to depart" from them as "the risk is too great that an imprudent instruction" may jeopardize "the conscientious conduct of an otherwise entirely fair trial." In the instant case, the above-quoted response from the trial judge, in response to the jury question, appeared, however unintentionally, to link failure to testify with keeping bad evidence from the jury, something that appellant immediately objected to after the damage had been done. We hold that the trial court's subsequent efforts to rectify the negative impact were insufficient. The trial judge's subsequent "curative" instruction that there was "nothing else before you" and that they "know nothing about the defendant" merely increased the potential inference that this was due to appellant's decision not to testify. At bar, we note that the defendant did request a curative instruction. However, even in the absence of such a request, the trial judge's comments, alone, would have been sufficiently damaging to constitute reversible error. Thus, we reverse and remand for a new trial on this ground.

STONE, J., and DONNER, AMY STEELE, Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF
FLORIDA

DAVID JONES
Appellant(s),

v.

STATE OF FLORIDA,
Appellee(s).

CASE NO. 93-03248
L.T. CASE NO. 93-6875 CF10
BROWARD
July 21, 1995

ORDERED that appellee's motion filed February 16, 1995, for rehearing and rehearing en banc is hereby denied; further,

ORDERED that appellee's motion for certification of conflict and certification of questions is denied.

I hereby certify the foregoing is a true copy of the original court order.

MARILYN BEUTTENMULLER
Clerk

cc: Public Defender 15
Attorney General—W. Palm Beach
Louis Carres
/MEB

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF
FLORIDA

DAVID JONES,
Appellant(s),

v.

CASE NO. 93-3248
August 15, 1995

STATE OF FLORIDA,
Appellee(s).

ORDERED that appellee's motion filed July 26, 1995, and amended motion filed July 27, 1995, to stay mandate are hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

MARILYN BEUTTENMULLER
Clerk

cc: Public Defender 15
Attorney General—W. Palm Beach
/CH

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

DAVID JONES,
Respondent.

CASE NO. 86,175
MONDAY, SEPTEMBER 11, 1995
District Court of Appeal,
4th District — No. 93-3248

Petitioner's Petition for Stay of Proceedings is hereby granted and proceedings in the District Court of Appeal, Fourth District, and in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, are hereby stayed pending disposition of the Petition for Review filed herein.

A True Copy
Test

Sid J. White
Clerk, Supreme Court

BDM

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark A. Speiser, Judge
Mr. James J. Carney
Mr. Louis G. Carres

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

DAVID JONES,
Respondent.

CASE NO. 86,175
District Court of Appeal,
4th District — No. 93-3248
TUESDAY, NOVEMBER 7, 1995

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V,§ 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. Crim. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING AND WELLS, JJ., concur.

A True Copy
Test

Sid J. White
Clerk, Supreme Court

BH

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark A. Speiser, Judge
Mr. James J. Carney
Mr. Louis G. Carres

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO. 93-6875 CF10(A)
JUDGE: MARK A. SPEISER

DAVID JONES,
Defendant.

ORDER GRANTING MOTION FOR STAY AND EXTENSION OF SPEEDY TRIAL PERIOD

THIS CAUSE coming on to be heard upon the motion of Robert L. Headrick, Assistant State Attorney, and the Court being otherwise fully advised in the premises, it is,

ORDERED AND ADJUDGED that the Motion for Stay and for Extension of Speedy Trial Time Pending Appeal to ninety (90) days after Order or decision resolving this case by U.S. Supreme Court in this cause.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida this 22nd day of December, 1995.

HONORABLE MARK A. SPEISER
Judge of the Circuit Court

copies furnished:
ROBERT HEADRICK, ESQ.
Assistant State Attorney
State Attorney's Office
DIANE CUDDIHY, ESQ.
Attorney for the Defendant
Public Defender's Office

[excerpts from original transcript pages 19–21]

[THE COURT]: Number one, at the outset of the trial as we sit here today ready to begin this trial you must view and presume the Defendant as being innocent. The Defendant through his lawyer Mr. Ivashuk has entered a plea of not guilty. By doing so in effect he has requested his day in court. And today is his day we affording Mr. Jones his day in court.

And when he begins this trial here today you must view and presume him as being innocent at the outset of the trial.

Cardinal rule number two, the state, the governmental body which Mr. Cohen represents has the burden of attempting to prove to us that the Defendant is guilty. In other words, if the State is going to charge somebody with committing a crime they must prove it.

In some communist and totalitarian societies, the number of which seem to be dwindling, if an individual is charged with committing a crime, number one, should he ever be lucky enough to get his day in court; number two, he walks into that courtroom and begins that trial presumed guilty. Number three, he the Defendant has to prove to the tribunal why he is innocent.

That's not the way it is in the good old U.S.A. And in all 50 states of the United States of America if you're charged with committing a crime you're darn right entitled to your day in court. And when you walked into that courtroom you begin

that trial presumed innocent and the State must prove you guilty. The Defendant never has to attempt to prove to the jury why he is innocent.

[excerpts from the original transcripts page 28]

[THE COURT]: Now, a couple points you must bear in mind. Every crime in the Florida criminal code has what's known as elements of proof. I'll tell you how many elements of proof there are. Battery on a law enforcement officer, attempted burglary of an automobile, and resisting without violence. Let's say hypothetically and for illustration purposes only that battery on a law enforcement officer had three elements of proof. For you to find the defendant guilty you must be satisfied beyond and to the exclusion of every reasonable doubt of the presence of the all three elements of the crime of battery on a law enforcement officer.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
JANUARY TERM 1996

JAMES McINNIS,
Appellant,

CASE NO. 94-2792
L.T. CASE NO. 93-5857CF10A

v.

STATE OF FLORIDA,
Appellee.

Opinion filed January 24, 1996

Appeal from the Circuit Court for Broward County; Charles M. Greene, Judge.

Richard L. Jorandby, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

POLEN, J.

James McInnis appeals from a final judgment and sentence convicting him of grand theft. McInnis alleges that the trial court fundamentally erred by unlawfully minimizing the "beyond a reasonable doubt" standard by instructing the venire that the state need not prove its case "to perfection or certainty." We agree and reverse.

The instruction given to the venire at bar is substantially similar to the jury instruction given in *Jones v. State,* 656 So. 2d 489 (Fla. 4th DCA 1995), as the trial court in *Jones* also instructed the venire that the state did not have to prove the defendant's guilt to an absolute certainty. In *Jones,* this court

held that the trial court's instruction, in which it stated that certitude was not required, abridged the reasonable doubt standard, a component of due process of law in a criminal proceeding. *Id.* At 490. This court further deemed such a minimization of the reasonable doubt standard fundamental error, as it deprived the appellant of his defense, the reliance on a correct instruction on the reasonable doubt standard. This court also distinguished *Jones* from the third district's opinion in *Freeman v. State,* 576 So. 2d 415 (Fla. 3d DCA 1991).

In *Freeman,* the court held that there was no reversible error in a complained-of portion of a jury instruction on reasonable doubt. The court noted that no objection was made by the defendant to this instruction, and the giving of the instruction did not otherwise rise to the level of fundamental error, especially when considered in context with the balance of the trial court's extensive and proper jury instructions on reasonable doubt and presumption of innocence. *Id.* At 416. Conversely, this court noted in *Jones* that there were insufficient balancing instructions.

At bar, as in *Jones,* the trial court repeatedly stressed that certitude of the defendant's guilt was not required. In accordance with *Jones,* this minimization of the reasonable doubt standard was fundamental error as it deprived McInnis of his defense (reliance on this standard). In addition, as in *Jones,* there were no proper balancing instructions. In both cases, the instructions were given to the venire, and the standard instructions were not given until the jury was being instructed before retiring. Without these balancing instructions, the error was fundamental. Accordingly, we reverse in accordance with our prior opinion in *Jones.*

KLEIN and PARIENTE, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

JAMES MICHAEL POOLE,
Appellant,

v. Case No: 94-2731

STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING AND REHEARING EN BANC AND MOTION FOR CERTIFICATION OF CONFLICT AND CERTIFICATION OF QUESTIONS

Appellee, the State of Florida, by and through undersigned counsel, moves this Honorable Court for rehearing and rehearing en banc in the above styled cause, on the following grounds which this Court has apparently overlooked and because the issue is one of exceptional importance.

I. REHEARING AND REHEARING EN BANC

In *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied*, ___ So. 2d ___ (Fla. Nov. 07, 1995)(Exhibit B), this Court held that a preliminary jury instruction on reasonable doubt constituted fundamental error because it indicated "absolute or "one hundred percent" certainty was not required. *Jones* did not mention that the complete, approved, standard jury instruction on reasonable doubt was given at the end of the case. *See Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994)(approving the standard jury instruction on reasonable doubt). The State had been arguing in the many cases affected by *Jones*, that this Court overlooked the fact that the complete, standard, approved, instruction was given. However, subsequent cases make it clear that this Court did not overlook that fact, it simply refused to consider the "balanc-

ing effect" of the standard instruction because it was not given until the end of the case:

> In addition, as in *Jones, there were no proper balancing instructions.* In both cases, the instructions were given to the venire, and *the standard instructions were not given until the jury was being instructed before retiring.* Without these balancing instructions, the error was fundamental.

McInnis v. State, Case no. 94-2792, reversed Jan. 24, 1996. Slip op. at 3 (emphasis supplied).

This Court's holding that it could not consider the standard, complete, approved standard jury instruction as a "balancing instruction" because it was not given until the end of the case, is directly and completely contrary to long-established, rudimentary, black-letter principles of law. In

Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944), the Court held:

> It is a recognized rule that a single instruction cannot be considered alone, but must be considered in light of *all* other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail (emphasis supplied).

This basic principle of law has not changed since *Higginbotham. See Austin v. State,* 40 So. 2d 896, 897 (Fla. 1949) (same); *Batson v. Shelton,* 13 So. 2d 453, 456 (Fla. 1943) (same); *Johnson v. State,* 252 So. 2d 361, 364 (Fla. 1971) (same); *Esty v. State,* 642 So. 2d 1074, 1080 (Fla. 1994) (same); *Life Insurance Company of North America v. Aguila,* 389 So. 2d 303, 304 (Fla. 5th DCA 1980)(same); *McCaskill v. State,* 344 So. 2d 1276, 1278 (Fla. 1977)(same); *Moore v.*

State, 308 So. 2d 563, 565 (Fla. 2d DCA 1975)(same); *Bennett v. State*, 350 So. 2d 556, 557 (Fla. 1st DCA 1977)(same); *Egantoff v. State*, 208 So. 2d 843, 845 (Fla. 2d DCA 1968) (same).

This Court has followed this basic principle of law in the past. *See Krajewski v. State*, 587 So. 2d 1175, 1180 (Fla. 4th DCA 1991) and *Sloan v. Oliver*, 221 So. 2d 435 (Fla. 4th DCA 1969).

This Court's unwillingness to follow this basic tenet is especially puzzling here, as the trial judge specifically incorporated by reference the complete, standard, approved instruction on reasonable doubt while giving the preliminary instructions on reasonable doubt (R 27):

> Now, I'll give a more elaborate definition of what that phrase beyond and to the exclusion of every reasonable doubt means when I give you the legal instructions at the conclusion of trial.

The trial judge also stated during preliminary instructions that (R 33):

> Now, the fifth phase of the trial is what's known as the legal instructions. It's where I give you the law that you apply to the evidence in this case. Any preconceived ideas you have as to what the law is, or what the law should be you should disregard.

This Court stated in *Jones*, that "At bar, the trial judge's instructions were accurate as far as they went." *Id.* at 491. It is extremely difficult to see how the preliminary instructions, which this Court admitted were "accurate as far as they went," could be fundamental error when considered with the standard, approved, complete jury instructions on

reasonable doubt, incorporated by reference into the preliminary instructions on reasonable doubt.

Jones as clarified in *McInnis,* directly conflicts with *Esty.* It also directly conflicts with *Higginbotham, Austin, Batson, Johnson, Aguila, McCaskill, Moore, Bennett,* and *Egantoff.* The opinion also conflicts with this Court's decisions in *Krawjewski* and *Sloan.* This Court should recede from *Jones.*

II. MOTION FOR CERTIFICATION

This claim has been raised in at least fifteen cases before this Court, including:

- *Cifuentes v. State,* Case No. 94-2059, reversed January 3, 1996
- *Frazier v. State,* Case No. 94-0600, 20 Fla. L. Weekly D2102 (Fla. 4th DCA Sept. 13, 1995), *rev. denied,* Case No. 86,543 (Fla. Dec. 19, 1995)
- *David Jones v. State,* 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied,* Case no. 86,175 (Fla. No. 7, 1995)
- *Jones v. State,* Case No. 94-2267, 20 Fla. L. Weekly D1908 (Fla. 4th DCA Aug. 23, 1995), *rev. denied,* Case no. 86,359 (Fla. Nov. 17, 1995)
- *Lusskin v. State,* Case No. 95-0721
- *McInnis v. State,* Case No. 94-2792, reversed January 24, 1996
- *Pierce v. State,* Case No. 93-1302
- *Poole v. State,* Case No. 94-2731, reversed January 24, 1996.
- *Rayfield v. State,* Case no. 94-0197, 20 Fla. L. Weekly D1907 (Fla. 4th DCA Aug. 23, 1995), *rev. denied,* Case No. 86,357 (Fla. Nov. 17, 1995)

- *Reyes v. State*, Case No. 95-0034
- *Variance v. State*, Case No. 94-3019, Case no. 94-3019, *reversed*, January 3, 1996
- *Wilson v. State*, 21 Fla. L. Weekly D37, reversed (Fla. 4th DCA Dec. 20, 1995)
- *Bove v. State*, Case no. 94-3142
- *Rodriguez v. State*, Case no. 95-0749

The trial judge had been giving this preliminary instruction for many years. Not surprisingly, this issue is also being raised in post-conviction motions. *See e.g., Tricarico v. State*, 629 So. 2d 142 (Fla. 4th DCA 1993)(DCA case no. 92-1935, first degree murder)(copy of pending 3.850 attached as exhibit D).

Obviously, some of theses cases may be difficult to retry. A great number of victims are affected by these cases. *Pierce* is a complex homicide case involving the death of a six-year-old girl and the serious injury of another child. *Lusskin* involves a conviction for solicitation to commit first degree murder. *Bove* is a first degree murder case. *Rodriguez* is an attempted first degree murder case.

In *McInnis*, this Court found the instruction of a *different* trial judge to be fundamental error under *Jones*. It is difficult to see how this issue could not be one of great public importance. Moreover, this case is ideal for certification as it involves only one issue.

Should this Court be unwilling to recede from its opinion, Appellee asks that this Court certify the following questions (or ones of this Court's choosing) as being of great public importance:

IS THIS COURT'S STATEMENT IN *HIGGINBOTHEM* THAT A SINGLE INSTRUCTION CANNOT BE CONSIDERED ALONE, BUT MUST BE CONSIDERED IN LIGHT OF ALL OTHER INSTRUCTIONS BEARING UPON THE SUBJECT, STILL GOOD LAW?

DOES THE PRELIMINARY REASONABLE DOUBT INSTRUCTION IN THIS CASE, COMBINED WITH THE STANDARD INSTRUCTIONS ON REASONABLE DOUBT AND PREPONDERANCE OF EVIDENCE GIVEN IN THIS CASE AND INCORPORATED BY REFERENCE INTO THE TRIAL JUDGE'S PRELIMINARY INSTRUCTIONS ON REASONABLE DOUBT, PRODUCE A REASONABLE LIKELIHOOD THAT THE INSTRUCTIONS WERE APPLIED IN AN UNCONSTITUTIONAL MANNER UNDER *VICTOR V. NEBRASKA?*

IF SO, DOES THE PRELIMINARY INSTRUCTION COMBINED WITH THE OTHER INSTRUCTIONS AMOUNT TO FUNDAMENTAL ERROR REVIEWABLE WITHOUT OBJECTION?

III. REHEARING EN BANC

By relying on *Cage v. Louisiana,* 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), in finding the instruction fundamental error, this Court apparently overlooked the fact that the United States Supreme Court subsequently decided *Victor v. Nebraska,* 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583 (1994) (Exhibit C). In *Victor,* the Court modified its standard of review from that in *Cage.* The Court held that the proper inquiry is not whether the instruction could have

been applied in an unconstitutional manner, but whether there is a "reasonable likelihood" that the jury did so apply it." *Id.* at 591. In *Victor,* the Court noted that *Cage* was the *only* time in history that it had found a definition of reasonable doubt to violate due process. *Id.* at 590. The Court then reviewed two reasonable doubt instructions, finding neither improper.

This Court faults the preliminary instruction given in this case because it indicated "certitude was not required" and because it suggested the jury may base a guilty verdict on a "probability of guilt so long as it was a remarkably strong probability." *Jones,* 656 So. 2d at 490.

In *Victor,* the defendants made a similar claim. The defendant argued that using "moral certainty" in the instruction was error because a dictionary defined "moral certainty" as "resting upon convincing grounds of probability." *Id.* at 595. The Supreme Court rejected that argument:

> But the beyond a reasonable doubt standard is itself *probabilistic.* '[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.
>
> * * *
>
> *The problem is not that moral certainty may be understood in terms of probability,* but that a jury might understand the phrase to mean something less than the *very high level of probability* required by the Constitution in criminal cases.

Id. at 595–96 (emphasis added). *See also United States v. Williams,* 20 F. 3d 125, 127, 131 (5th Cir.), *cert. denied,* ___

U.S. ___, 115 S. Ct. 246, 130 L. Ed. 2d 168 (1994) (relying on *Victor* to reject challenge to instruction equating reasonable doubt to a "real possibility.")

In *Victor,* the Court found no error in the following instruction:

> 'Reasonable doubt' is such doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction *to a moral certainty,* of the guilt of the accused. At the same time, *absolute or mathematical certainty is not required. You may be convinced of the truth of the fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon strong probabilities* of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. *A reasonable doubt is an actual and substantial doubt* arising from the facts or circumstances shown by the evidence, or from lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Id. at 598 (some emphasis added).

The questioned language in this case is not nearly as strong as that in *Victor.* The instruction in this case merely stated that absolute certainty was not required. It isn't. Moreover, the instruction was balanced. The jury was told that it was a very heavy burden. It was told that a reasonable doubt was

any doubt it could attach a reason to so long as it was not a mere possible, speculative or imaginary doubt (R 27–28). This is not a minimization of the burden.

The complete, approved standard instructions on reasonable doubt were given here. *See Victor* (instructions must be read as a whole). Those instructions included the "abiding conviction of guilt" language (R 668–70), which *Victor* specifically held correctly states the Government's burden of proof. *Id.* at 596. *Victor* held that when that language was combined with the challenged language, any problem with the instruction was cured. *Id.*

Appellee has been unable to locate any cases decided since *Victor* that have found an instruction at all similar to the ones given here to be error, let alone fundamental error. *See, e.g., Pilcher v. State,* 214 Ga.App. 395, 448 S.E.2d 61, 63 (1994) (instruction including statement that state was not required to prove the guilt of the accused beyond all doubt or to a "mathematical certainty" was proper under *Victor*); *People v. Reyes,* 615 N.Y.S.2d 450, 451 (A.D.2), *appeal denied,* 84 N.Y.2d 871, 642 N.E. 2d 336, 618 N.Y.S.2d 17 (1994) (instruction referring to reasonable doubt as "something of consequence" and "something of substance" not improper under *Victor.*); *Strong v. State,* 633 N.E.2d 296 (Ind.App. 5 Dist. 1994) (instruction defining reasonable doubt as "fair, actual and logical doubt" was proper under *Victor); State v. Bryant,* 446 S.E.2d 71 (N.C. 1994) (instruction defining reasonable doubt as a "substantial misgiving" was not improper under *Victor); State v. Smith,* 637 So.2d 398 (La.), *cert. denied,* ___ U.S. ___, 115 S. Ct. 641, 130 L. Ed. 2d 546 (1994) (instruction including terms "substantial doubt" and "grave uncertainty" not improper under *Victor); People v. Gutkaiss,* 614 N.Y.S. 2d 599, 602 (A.D. 3 1994) (use of terms "substantial uncertainty" and "sound substantial reason" not error under *Victor); Butler v. U.S.,* 646 A.2d 331, 336-37 (D.C.App. 1994) (instruction that defines reasonable doubt as one that leaves juror so undecided that he cannot say he is "firmly convinced" of defendant's guilt, was not error under *Victor)* and *Minor v.*

United States, 647 A.2d 770, 774 (D.C.Ap.. 1994) (trial judge's misstatement that government was not required to prove defendant's guilt beyond a reasonable doubt was not reversible error under *Victor* when considered with full instructions).

FUNDAMENTAL ERROR

In finding *fundamental* error by the "[f]ailure to give a complete reasonable doubt instruction," this Court also apparently overlooked the fact that this instruction was a preliminary instruction, given at the start of voir dire. The standard complete jury instructions on reasonable doubt and burden of proof were given at the close of evidence (R 668–70). It is difficult to see how the preliminary instruction can be fundamental when the approved standard jury instruction was given at the close of the case. *See Rojas v. State,* 552 So. 2d 914, 915 (Fla. 1989) (an error during reinstruction is not fundamental and requires and objection to preserve the error). *See also People v. Reichert,* 433 Mich. 359, 445 N.W. 2d 793 (1989) (trial court's remarks during voir dire did not mislead jurors concerning their power to convict or acquit).

Additionally, the preliminary instruction properly informed prospective jurors that absolute certainty was not required in a criminal trial. *See Drew v. State,* 743 S.W. 2d 207, 209 (Tex.Cr.App. 1987) (prospective juror properly struck by State where he said he would require "one hundred percent" proof as that level of proof exceeded the reasonable doubt standard); *Narvaiz v. State,* 840 S.W. 2d 415, 426–27 (Tex. Cr. App. 1992), *cert. denied,* ___ U.S. ___, 113 S. Ct. 1422, 122 L. Ed. 2d 791 (1993) (same); *Ruland v. State,* 614 So. 2d 537, 538 (Fla. 3d DCA), *rev. denied,* 626 So. 2d 207 (Fla. 1993) (same) and *United States v. Hannigan,* 27 F. 3d 890, 894 (3rd Cir. 1994) n. 3 (reasonable doubt standard does not require 100 percent probability).

In the area of jury instructions, to be fundamental, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been

obtained without the assistance of the alleged error." *Jackson v. State*, 307 So. 2d 232, 233 (Fla. 4th DCA 1975); *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991). *See also United States v. Merlos*, 8 F. 3d 48 (D.C. Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1635, 128 L. Ed. 2d 358 (1994) (instruction equating reasonable doubt with "strong belief" in defendant's guilt did not constitute fundamental error); *Perez v. State*, 639 So. 2d 200 (Fla. 3d DCA 1994) (no fundamental error shown by unobjected to reasonable doubt instruction, citing *Victor); Minshew v. State*, 594 So. 2d 703, 713 (Ala. Cr. App. 1991) *(Cage* claim not preserved where no objection made below).

In *Farrow v. State*, 573 So. 2d 161 (Fla. 4th DCA 1990)(en banc), this Court receded from cases finding a "read back" instruction to be fundamental error. In finding that the instruction was not fundamental error this Court noted that this was a preliminary instruction given at the beginning of trial. This Court also noted that defense counsel could have immediately brought the problem to the attention of the trial court and obtained a curative instruction. *See Webb v. State*, 519 So. 2d 748, 749 (Fla. 4th DCA 1988) (whether an instruction constitutes fundamental error depends upon its egregiousness and whether a corrective instruction would have obliterated the taint). The Court also found that specific and confusing substantive instructions can be held not to be fundamental. *Id.* at 163. Assuming that the preliminary instruction here was somehow unartful, it was not egregious. Any problem could have easily been rectified by a curative instruction.

In *Esty v. State*, 642 So. 2d 1074 (Fla. 1994), the defendant objected to the standard reasonable doubt instruction on the basis that it contained terms including "possible doubt." *Id.* at 1080. The Florida Supreme Court found the issue unpreserved because defense counsel never requested or submitted an alternate instruction. The Court went on to hold that the standard jury instruction (the one given here at the end of the case) was proper under *Victor. Id.* at 1080. *See also Van*

Note v. State, 366 So. 2d 78, 79 (Fla. 4th DCA), *cert. denied,* 376 So. 2d 76 (Fla. 1979) (improper, unnecessary and wrong preliminary *Allen* charge did not constitute fundamental error); *Sochor v. State,* 619 So. 2d 285, 290 (Fla.), *cert. denied,* ___ U.S. ___, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1993) (failing to instruct on a defense does not constitute fundamental error) and *Ray v. State,* 403 So. 2d 956 (Fla. 1981) (defining fundamental error and holding that constitutional error is not necessarily fundamental error).

In finding fundamental error, this Court indicated it was distinguishing *Freeman v. State,* 576 So. 2d 415 (Fla. 3d DCA 1991) because in that case the Court also gave extensive and proper jury instructions on reasonable doubt and presumption of innocence. However, in this case the trial judge gave the full and approved instructions on these matters.

Finally, Appellee notes that this issue (involving the same trial judge) has previously been rejected by this Court. In *Barr v. State,* 572 So. 2d 552 (Fla. 4th DCA 1990)(Case no. 89-1680), appellant claimed that this trial judge fundamentally erred in giving preliminary "read back" and reasonable doubt instructions. This Court affirmed, simply citing *Farrow. See also Mingo v. State,* 626 So. 2d 259 (Fla. 4th DCA 1993)(Case no. 91-2516) (rejecting arguments in the brief challenging this judge's preliminary reasonable doubt instruction on multiple grounds). This Court has copies of the briefs filed in *Barr* and *Mingo.* This Court should take judicial notice of those briefs in considering this rehearing. *See Wilson v. State,* 645 So. 2d 1042, 1045 (Fla. 4th DCA 1994) (where this Court took judicial notice of its records in three cases in finding its action in *Wilson* proper.); *R.C. v. State,* 20 Fla. L. Weekly D287 (Fla. 3d DCA Feb. 1, 1995) n. 2 (court judicially noticing PCA without written opinion in affirming on same issue) and *Arnold Lumber Co. v. Harris,* 503 So. 2d 925, 927 (Fla. 1st DCA 1987), n. 1 (court may take judicial notice of its files).

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

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WHEREFORE, Appellee respectfully requests that this Court grant the motion for rehearing and rehearing en banc and withdraw the opinion in this case and affirm. If this Court is unwilling to do so, Appellee asks that this Court certify the questions above or one of its choosing and certify conflict with *Moore, Aguila* and *Egantoff.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished by courier to Ian Seldin, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach, FL 33401, this ____ day of January 1996.

_____

Of Counsel